NO. 80-1501

Office-Supreme Court, U.S.
FILED
MAR 2 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court Of The United States

———— TERM, 1981

DOROTHY HOPE SULLIVAN, DAVID SULLIVAN AND WARREN SULLIVAN,
Petitioners,

VS.

FIRST TENNESSEE BANK N.A. MEMPHIS, EXECUTOR OF THE ESTATE OF LULA S. TORIAN, LOUISE CRUM SMITH, RALPH CRUM, JAMES CRUM, F. BATES SULLIVAN, C. H. SULLIVAN, JR., LOUISE SULLIVAN JENNINGS, VIRGINIA SULLIVAN McDANIELS, FRANCES SULLIVAN RICE, MARY CHARLOTTE GIBSON, ESTATE OF H. D. TORIAN, HON. HENRY WILSON, AND HON. LEON HANNAFORD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

EDWARD P. CONNELL
JACK F. DUNBAR
HOLCOMB, DUNBAR, CONNELL, MERKEL, TOLLISON & KHAYAT
A Professional Association
Post Office Box 368
Clarksdale, Mississippi 38614
(601) 627-2241

Counsel for Petitioners Dorothy Hope Sullivan David Sullivan and Warren Sullivan

QUESTION PRESENTED

May the District Court assume interpleader jurisdiction over the Complaint of the Executor Bank where the Bank holds no stake or property which is the subject of adverse claims, and the Bank is simply attempting to seek judgment to compensate it for estate taxes which the Arkansas Courts ordered the Bank to pay out of its own funds as the result of the Bank's mismanagement of the Estate?

TABLE OF CONTENTS

Page

OPINIONS BELOW iv

JURISDICTION OF THE SUPREME COURT v

THE REVELANT STATUTORY PROVISION v

STATEMENT OF THE CASE vii

REASONS FOR GRANTING THE WRIT 1

CONCLUSION 11

APPENDIX A

Opinion of 6th Circuit Court of Appeals A-1

Opinion of 6th Circuit Court of Appeals denying Petition for Rehearing A-5

APPENDIX B

Complaint filed in U.S. District Court ..... B -7

Opinion of Chancery Court, Desoto County, Mississippi B-16

Opinion of Mississippi Supreme Court B-18

Order of Probate Court, Crittenden County, Arkansas B-30

Opinion of Probte Court, Crittenden County, Arkansas B-32

Opinion of Arkansas Supreme Court B-39

Denial of Petition for Writ of Certiorari to the Arkansas Supreme Court B-52

Miss. Code Ann. §91-7-91 ..... B-85

Miss. Code Ann. §91-7-191 ..... B-85

TABLE OF AUTHORITIES

CASES:

Estate of Torian v. First National Bank of Memphis, 321 So.2d 287 (1975) iv

Estate of Torian v. Smtih, 263 Ark. 304, 564 SW2d 521 (1978) v

General Atomic Co. v. Duke Power Co., 553 F.2d 53 (10th Cir. 1977) 5

Gidden v. Gidden, 176 Miss. 98, 167 So.2d 785 (1936) ... 7

Merrill, Lynch, Pierce, Fenner & Smith v. Cavicchia, 311 F. Supp. 149 (S.D. N.Y. 1970) 4

State Farm Fire & Casualty Co. v. Tashire, 386 U.S. 523 (1976) 5

Texas v. Florida, 306 U.S. 398 (1939) 2

Treinies v. Sunshine Mining Co., 308 U.S. 66 (1939) ... 4

STATUTES:

28 U.S.C. §1335 v

28 U.S.C. §2101(c) v

Miss. Code Ann. 1972 §91-7-91 (Supp. 1976) 7

Miss. Code Ann. 1972 §91-7-191 7

OPINIONS BELOW

On November 3, 1980, the United States Court of Appeals for the Sixth Circuit issued its decision, as yet unreported, affirming the District Court's interlocutory orders. (App. A 1) On December 5, 1980, the Court of Appeals issued its Order denying the Petition for Rehearing filed on behalf of Petitioners Sullivan, et al. (App. A 5)

The Hon. Judge Robert M. McRae, Jr., of the United States District Court for the Western District of Tennessee, Western Division, issued his bench opinion sustaining interpleader jurisdiction and granting a preliminary injunction on December 15, 1978. (App. B 73-77) On December 27, 1978, a written Order Granting Preliminary Injunction and Denying Motions to Dismiss was entered by the District Court. (App. B 82-84) On January 17, 1979, the District Court issued its written Findings of Fact and Conclusions of Law. (App. B 77-82) All of these decisions of the District Court are unreported.

Several decisions of the Courts of Arkansas and Mississippi are essential to the determination of the jurisdictional question presented by this Petition. The unreported decision of the Chancery Court of Desoto County, Mississippi, involving the Estate of Mrs. Torian was issued March 13, 1974. (App. B 16, 17) That decision was affirmed by the Mississippi Supreme Court in a reported opinion styled *Estate of Torian v. First National Bank of Memphis,* Miss. 321 So.2d 287 (1975). (App. B 18-30)

An unreported decision of the Probate Court of Crittenden County, Arkansas, in the matter of the Estate of Mrs. Torian was issued on November 24, 1976. (App. B 32-38) The reported decision of the Arkansas Supreme Court

affirming the Probate Court's order is styled *Estate of Lula S. Torian v. Louise Crum Smith, et al*, 263 Ark. 304, 564 SW 2d 521 (April 24, 1978). (App. B 39-51)

On October 2, 1978, the United States Supreme Court denied the Bank's Petition for Writ of Certiorari to review the judgment of the Arkansas Supreme Court. (App. B 52)

JURISDICTION OF THE SUPREME COURT

The Order of the Court of Appeals of which Petitioners seek review was entered on November 3, 1980. Petitioners filed a timely Petition for Rehearing in the Court of Appeals, which Petition was denied by Order of the Court of Appeals on December 5, 1980. (App. A-5)

This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari by virtue of 28 U.S.C. §2101(c).

THE RELEVANT STATUTORY PROVISION

28 U.S.C. §1335 Interpleader:

> (a) The district courts shall have original jurisdiction of any civil action of interpleader or in the nature of interpleader filed by any person, firm, or corporation, association, or society having in his or its custody or possession money or property of the value of $500 or more, or having issued a note, bond, certificate, policy of insurance, or other instrument of value or amount of $500 or more, or providing for the delivery or payment or the loan of money or property of such amount or value, or being under any obligation written or unwritten to the amount of $500 or more, if

(1) Two or more adverse claimants, of diverse citizenship as defined in section 1332 of this title, are claiming or may claim to be entitled to such money or property, or to any one or more of the benefits arising by virtue of any note, bond, certificate, policy or other instrument, or arising by virtue of any such obligation; and if (2) the plaintiff has deposited such money or property or has paid the amount of or the loan or other value of such instrument or the amount due under such obligation into the registry of the court, there to abide the judgment of the court, or has given bond payable to the clerk of the court in such amount and with such surety as the court or judge may deem proper, conditioned upon the compliance by the plaintiff with the future order of the court with respect to the subject matter of the controversy.

(b) Such an action may be entertained although the titles or claims of the conflicting claimants do not have a common origin, or are not identical, but are adverse to and independent of one another.

STATEMENT OF THE CASE

First Tennessee Bank (hereinafter the "Bank") is the Executor of the Estate of Lula S. Torian. Mrs. Torian died testate in 1972, domiciled in Arkansas, but owning some 920 acres of real property in Desoto County, Mississippi. Mrs. Torian had lived in Mississippi for many years and first married at age 79, in 1960. After her marriage, she resided in her husband's home in Arkansas, but Mrs. Torian continued to maintain her home in Mississippi.

Mrs. Torian's estate consisted of the Mississippi land, which was valued at $920,000 for tax purposes and bank accounts and stocks and bonds valued at approximately $486,000 at the time of her death. (App. B 40, 34) According to Mrs. Torian's Will, the land was devised to Dorothy Hope Sullivan, David Sullivan, Warren Sullivan, and Robert Lamb Sullivan (hereinafter "Mississippi beneficiaries"), all Mississippi residents, and Petitioners here with the exception of Robert Lamb Sullivan who was not served with process in this action. The residuary estate was devised to Louise Crum Smith, Ralph Crum, F. Bates Sullivan, C. H. Sullivan, Jr., Louise Sullivan Jennings, Virginia Sullivan McDaniel, Frances Sullivan Rice and Mary Charlotte Gibson, all Tennessee residents (hereinafter the "Arkansas beneficiaries," since they favored application of Arkansas law). (App. B 20, 29)The "Arkansas beneficiaries" are filing a separate Petition for Certiorari.

Mississippi law requires that in the absence of a contrary will provision, the personalty in an estate must bear the entire burden of the debts and expenses of the estate (including federal estate taxes) and the real property is liable for the tax only after the personal estate has been exhausted. (App. B 27, 28) Under Arkansas law, the estate

tax is apportioned equally among all estate beneficiaries. (App. B 42)

The Bank, as Executor, petitioned the Chancery Court of Desoto County, Mississippi, seeking to probate Mrs. Torian's Will in Mississippi. The Bank's petition was granted on November 3, 1972. Prior to the Bank's filing its petition in the Mississippi court, the Bank's attorney Mr. Spears advised the Bank against taking this course of action because of the conflicting laws of Arkansas and Mississippi. (App. B 48)

On May 9, 1973, the Bank petitioned the Arkansas Probate Court requesting postponement of the filing of an inventory because of the question of whether Arkansas or Mississippi was the proper forum for original jurisdiction to probate the will. (App. B 40-41)

On July 26, 1973, the Bank petitioned the Mississippi court seeking permission to withdraw the will from probate there and transfer it to Arkansas. (App. B 40)

The Mississippi beneficiaries objected to the Bank's petition to transfer the will to Arkansas and sought the application of Mississippi law which would allocate the payment of estate taxes to the residuary estate rather than the land. The Arkansas beneficiaries, whi all participated in the Mississippi suit, urged that the will be transferred to Arkansas. (App. B 20)

The Mississippi Chancellor found, as a fact, that Mrs. Torian had intended for her estate to be administered in accordance with Mississippi law. (App. B 23) The Mississippi Supreme Court affirmed the Chancellor's findings and held, in addition, that under the "interest analysis" approach to conflicts of law which is followed in Mississippi,

Mississippi had the greatest contacts with the Estate of Mrs. Torian. (App. B 23) This conclusion was based on the facts that there were no Arkansas citizens involved in the controversy, no real property located in Arkansas, and the personal property which Mrs. Torian owned at the time of her death was physically located in Tennessee. Mississippi, on the other hand, was the forum state, the home of the devisees of the real property, the situs of the land, and the law Mrs. Torian intended should apply. (App. B. 29) The Mississippi Supreme Court also held that once the Bank itself chose to probate the will in Mississippi, and it was not done by mistake, Mississippi law prohibited the withdrawal of the will. (App. B 24-25) The Mississippi Supreme Court affirmed the Chancellor's order that the estate taxes should be paid out of the residuary estate.

The Bank did not then seek interpleader relief before paying the taxes. Instead, the Bank paid the taxes and when it was required to file its inventory by the Arkansas Probate Court in April of 1976, it sought credit for the amount of total federal estate taxes paid, including the tax related to the Mississippi land. (App. B 34) The Bank did not seek authorization from the Arkansas probate court prior to paying the taxes, although nothing prevented it from doing so. Arkansas law provides that all payments made by the executor without order of the court are made at his own peril. (App. B 35)

In the Arkansas Probate Court, the Arkansas beneficiaries objected to the Bank's accounting, asserting that Arkansas law applied and therefore their share of the estate should not be liable for the taxes allocable to the Mississippi land (some $228,000). (App. B 43)

The Arkansas Probate Court ruled that the Mississippi

Supreme Court's judgment applying Mississippi law to allocate the tax burden was entitled to full faith and credit only insofar as it affected the real property in Mississippi. (App. B 47) Because the Bank, in its role as Executor of the Arkansas estate, was not subject to the jurisdiction of the Mississippi courts, their judgment was not entitled to full faith and credit insofar as it affected the assets of the Arkansas estate. (App. B 47) Applying its own conflicts rules, the Arkansas Supreme Court found that Arkansas apportionment law should govern the estate tax liability insofar as it affected the Arkansas estate assets. (App. B. 42)

The Bank petitioned the United States Supreme Court for a Writ of Certiorari to review the Arkansas Supreme Court's judgment, and its petition was denied on October 2, 1978. (App. B 52)

The necessary result of the Arkansas and Mississippi judgments was that the Bank, which had already paid the estate taxes in 1976 could not seek reimbursement from the Mississippi beneficiaries because of the final judgment of the Mississippi Supreme Court holding the Mississippi beneficiaries were not liable to pay the estate taxes. The Arkansas Supreme Court held that portion of the Mississippi judgment was entitled to full faith and credit. The Arkansas Supreme Court's judgment also held that the Bank could not obtain reimbursement from the Arkansas beneficiaries, but rather the Bank itself must bear the $228,000 tax liability. In so holding, the Arkansas Supreme Court commented at length on the Bank's mismanagement of the Torian Estate, also denying the Bank most of the fees and expenses which are statutorily authorized for the executor. (App. B 49-51)

The judgment of the Arkansas Supreme Court which made the Bank itself liable for the payment of the estate taxes was rendered on April 24, 1978, six years after Mrs. Torian's death. The Bank had never attempted to file an interpleader action during that six year period.

On November 17, 1978, the Bank filed this interpleader action in the United States District Court for the Western District of Tennessee. The Bank, claiming jurisdiction under 28 U.S.C. §1335, joined as defendants all the Arkansas beneficiaries and all the Mississippi beneficiaries (except for Robert Lamb Sullivan who was not served with process). The Bank sought an ex parte restraining order enjoining the Arkansas and Mississippi Courts from taking any action on the estate. (App. B 53) The District Court refused to issue the ex parte order. (App. B 59) The Mississippi and Arkansas beneficiaries both filed Motions to Dismiss the Bank's Complaint for lack of subject matter jurisdiction under 28 U.S.C. §1335, for the reason that the Bank had failed to demonstrate that it held any fund or property to which there were adverse claimants; and that none of the defendants had any claims whatsoever against the Bank, or against any estate assets. (App. B 60-64)

The District Court heard the testimony of the estate administration officer of the Bank who testified that the Bank had already paid the estate taxes on the land out of its own funds. He also testified that no claims were being asserted against the Bank by either the Mississippi beneficiaries or the Arkansas beneficiaries. (App. B 67-72)

The District Court then denied the defendant's Motions to Dismiss, holding that the Bank had satisfied the requirements of interpleader jurisdiction. (App. B 73-77) The District Judge also enjoined the Probate Court of Arkansas

and the Chancery Court of Mississippi from proceeding to close Mrs. Torian's Estate. (App. B 82-84) The District Court, pursuant to 28 U.S.C. §1292(b) made certification to the Court of Appeals to permit interlocutory appeal of its order denying the Motions to Dismiss. (App. A 2)

Both the Mississippi and the Arkansas beneficiaries appealed the District Court's decision to the Court of Appeals. On November 3, 1980, the Sixth Circuit issued a brief opinion affirming the interlocutory orders of the District Court. (App. A 2-3)

Petitioners here seek review of the Court of Appeals' ruling that interpleader jurisdiction is present. Should Petitioners prevail, the preliminary injunction granted by the District Judge would necessarily be dissolved.

IN THE

Supreme Court Of The United States

———— TERM, 1981

NO.

DOROTHY HOPE SULLIVAN, DAVID SULLIVAN, AND WARREN SULLIVAN; LOUISE CRUM SMITH, RALPH CRUM, JAMES CRUM, F. BATES SULLIVAN, C. H. SULLIVAN, JR., LOUISE SULLIVAN JENNINGS, VIRGINIA SULLIVAN McDANIELS, FRANCES SULLIVAN RICE, AND MARY CHARLOTTE GIBSON,
Petitioners,

VS.

FIRST TENNESSEE BANK N.A. MEMPHIS, EXECUTOR OF THE ESTATE OF LULA S. TORIAN, ESTATE OF H. D. TORIAN, HON. HENRY WILSON, AND HON. LEON HANNAFORD,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REASONS FOR GRANTING THE WRIT

By assuming statutory interpleader jurisdiction over this matter, the courts below have expanded interpleader

jurisdiction beyond the terms of the statute, beyond the decisions of this Court, and beyond the purpose of the interpleader statute.

The purpose of the interpleader statute is to protect a stakeholder from the "risk of loss resulting from the threatened prosecution of multiple claims." *Texas v. Florida*, 306 U.S. 398, 410, 59 S.Ct. 563, 83 L.Ed. 817 (1939).

The Bank may at one time have been a disinterested stakeholder in need of the relief of the interpleader statute. As the Executor of the Estate of Mrs. Torian, the Bank might have filed an interpleader action, deposited the estate assets into a federal district court, and the district court could have decided which group of beneficiaries should pay the estate taxes out of its share of estate assets. The Bank, like other interpleader plaintiffs, could have thereby avoided the burden of multiple litigation and the risk of inconsistent judgments.

Instead of seeking relief in a bill of interpleader, the Bank itself instituted the proceedings first in the Mississippi Chancery Court and then, in the Arkansas Probate Court. The Arkansas Supreme Court found as a fact that the Bank did so against the warning and advice of counsel. (App. B 48) The Bank was aware of the conflicting rules concerning payment of estate taxes in Arkansas and Mississippi, yet it made no attempt to seek interpleader relief.

The Bank itself instituted the actions which culminated in the final judgments of Mississippi and Arkansas. Now it seeks interpleader relief on the basis that those judgments are inconsistent and subject it to multiple liability on a single obligation.

The Bank, by itself instituting both the Mississippi and

the Arkansas proceedings, has differentiated itself from the plaintiffs in every other reported interpleader action.

Never before has a stakeholder sought judgments against each group of claimants in two different state courts and subsequently filed an interpleader action seeking relief from the final judgments it procured. No purpose of the interpleader statute is served by granting relief to such a party.

Even more important here is the fact that by obtaining final judgments in both Mississippi and Arkansas, the Bank has been required to pay the taxes out of its own funds, leaving the two groups of beneficiaries (defendants to this interpleader action) with no claim against the Bank whatsoever. Likewise, the Bank no longer holds any property or "stake" to which there are adverse claims. The Bank's interpleader action, filed at this late date, cannot possibly meet the statutory jurisdictional requirements for interpleader.

Yet the District Court and the Court of Appeals found interpleader jurisdiction was present, without ever answering the impossible question of how the jurisdictional requirements could be met when the Plaintiff no longer held any stake or property as to which there were adverse claims.

Judge McRae, of the District Court, in his bench opinion held:

> I regret that the bank didn't at some point much earlier say 'Here are all the assets, I will pay them into some appropriate interpleader court or bond.' And let the bank by agreement continue to administer the assets, or protect them so they earn

> money. But that wasn't done. * * * I am going to hold that the bank did not wait too late, and that this is an appropriate means of putting together the adverse claims of who should bear the brunt of these taxes. * * * I do believe that the Supreme Court of the United States in its rulings has indicated that interpleader is an appropriate vehicle where you have inconsistent judgments from the states. (App. B 73-74) The thing that has persuaded me to go this route is that I have become persuaded that some court has to be available to resolve this matter. (App. B 75)

Petitioners respectfully submit that the error in Judge McRae's ruling is that he fails to recognize that while *Treinies v. Sunshine Mining Co.,* (308 U.S. 66 (1939)) held that the existence of inconsistent state court judgments does not preclude the bringing of an interpleader action, the mere existence of inconsistent state court judgments is no substitute for fulfillment of the jurisdictional requirements of the interpleader act.

In the interpleader cases which have involved inconsistent state court judgments, the interpleader plaintiff has demonstrated that he still held some stake or property to which the defendants were asserting adverse claims.[1]

[1]In **Treinies v. Sunshine Mining Co.,** 308 U.S. 66 (1939) where there were judgments of the Idaho and Washington State Courts ordering the interpleader plaintiff, Sunshine Mining Co., to recognize the ownership rights of the various claimants to the stock, the Mining Company still held the stock and deposited it into the registry of the Court at the inception of its interpleader action. 308 U.S. at 72.

In **Merrill, Lynch, Pierce, Fenner & Smith v. Cavicchia,** 311 F. Supp. 149 (S.D. N.Y. 1970) the interpleader plaintiff had been directed by New York courts and New Jersey Courts to convey certain securities to different parties. Before complying with either court's order, the plaintiff filed its interpleader.

Moreover, Judge McRae candidly admitted that he was persuaded to assume jurisdiction because "some court has to be available to resolve this matter."

The failing of this rationale is pointed out by the Tenth Circuit in *General Atomic Co. v. Duke Power Co.*, 553 F.2d 53, 56-58 (10th Cir. 1977):

> . . . we must decide the case within the framework of the interpleader statute in view of the obvious limiting principle that federal courts are courts which are dependent upon Congress for the exercise of subject matter jurisdiction. The only jurisdictional offering is the interpleader statute and our decision must be made in terms of its *specific criteria*. It is not . . . for us to redesign the interpleader statute in order for it to accommodate this unusual lawsuit. As was said by the Supreme Court in *State Farm Fire & Casualty Co. v. Tashire*, 386 U.S. 523, 18 L.Ed 279, 87 S.Ct. 1199 (1976), the interpleader procedure is not a bill of peace capable of furnishing a tribunal in every multiparty lawsuit. It is of limited breadth and scope and does not fit the case at bar. (Emphasis added)

The Court of Appeals affirmed Judge McRae's finding of interpleader jurisdiction without explaining how the specific jurisdictional criteria of the statute had been met. (App. A 2-4)

Assuming, without conceding, that the judgments of Arkansas and Mississippi are in conflict, a federal court may not assert interpleader jurisdiction merely because it appears to be a practical solution to the Bank's self-inflicted dilemma. The interpleader statute does not authorize juris-

diction, and the district court should not be permitted to assume it.

When It Filed This Interpleader Action, The Bank Held No Property To Which There Were Adverse Claimants.

The Bank's Complaint filed at the inception of this Interpleader action fails to allege that the Plaintiff Bank holds any property, fund, or stake which is subject to adverse claims by the defendants. (App. B 7) In its prayer for relief, the Bank's Complaint does not ask the Court to determine the proper disposition of any interpleaded property. Rather, the Bank seeks to recover a money judgment from the defendants. (App. B 13) The District Court found that following the decision of the Mississippi Supreme Court, the Bank paid the estate taxes with assets of the residuary estate (the Arkansas estate). (App. B 79) The Bank, in its accounting to the Arkansas Probate Court, sought credit for the entire amount of estate taxes paid. The Arkansas Court held that the amount of estate taxes attributable to the Mississippi land (some $228,000, App. B 43) could not be charged to the residuary estate. The Arkansas judgment thus required the Bank to use its own funds to reimburse the residuary estate for the estate taxes paid.

At the hearing in the District Court held in connection with defendants' Motions to Dismiss for lack of jurisdiction, the representative of the Bank testified that in complying with the Order of the Arkansas Courts, the Bank had paid $229,114.34 of its own funds to the Arkansas beneficiaries plus interest of $27,795.02. (App. B 67)

The only assets remaining in the Arkansas estate were the amounts reserved pursuant to the Arkansas Probate

Court's order for some additional Arkansas state taxes, attorney's fees and similar items. (App. B 70) All assets of the Arkansas estate had been distributed or earmarked for specific obligations. There are no assets in the hands of the Bank to which the Arkansas beneficiaries have any claim, or could have any claim.

Similarly, at the time the Bank filed its interpleader in District Court, there were no assets in the Mississippi estate account. The Bank held no property to which the Mississippi beneficiaries had any claim or could have any claim.

Under Mississippi law, title to the real property of a decedent never vests in the executor (as title to personalty does) but instead goes directly to the devisees or heirs. *Gidden v. Gidden*, 176 Miss. 98, 167 So. 785 (1936); Miss. Code Ann. 1972 §91-7-91 (Amended, 1976) (App. B 85). If the personalty has been exhausted by the payment of debts and taxes, the executor must petition the chancery court for an order authorizing the sale of the lands to satisfy the outstanding debts of the estate. Miss Code Ann. 1972 §91-7-191 (App. B 85)

Pursuant to the statutory scheme of Mississippi, title to Mrs. Torian's Mississippi land vested in the Mississippi beneficiaries upon her death, in 1972, and the Mississippi beneficiaries have been farming the land ever since.

Obviously, the Bank as executor of Mrs. Torian's estate holds no property to which the Mississippi beneficiaries have any claim, and under the Mississippi law, the Bank as executor never had control or possession of any property to which the Mississippi beneficiaries had any claim.

In an attempt to avoid the inescapable conclusion that

the Bank no longer holds any property to which there are adverse claims, the Bank took the position that because the Arkansas and Mississippi estates have not been finally closed, the distributions are of an "interim" nature. The Bank claimed that the laws of Arkansas and Mississippi allow adjustments of an executor's accounts at any time prior to final accounting.

This argument fails to establish that the Bank holds any property to which there are conflicting claims. The Mississippi beneficiaries already own the Mississippi real property and there is no lien for taxes against it. The Bank has already distributed the Arkansas personalty to the Arkansas beneficiaries without charging against it the federal estate taxes related to the Mississippi land. The Bank has paid the taxes with its own funds. Therefore, it is certain that neither the Arkansas nor Mississippi beneficiaries will ever make any claim against the Bank for anything. Each has already received all the property to which they have claimed entitlement.

The Bank claimed that it fulfills the stakeholder requirement of the interpleader statute because in its final accounting prior to closing the estates, it can still charge either the Arkansas or Mississippi beneficiaries for the taxes which it paid out of its own funds.

The Bank's position reveals that the nature of this suit is not an interpleader. The Bank is seeking to recover a sum of money from either of the defendants. Interpleader requires exactly the opposite: that the plaintiff have some control over property which the defendants seek to recover. The conclusion of *General Atomic Co. v. Duke Power Co.*, 553 F.2d 53, 57 (10th Cir. 1977) is equally applicable here:

> The structure of this action considered as a whole is such that it fails completely to qualify as an interpleader procedure. The property is not in the hands of the plaintiff and thus it cannot be placed by plaintiff in the custody of the court. The essential aspect is that the res be under the control of the person bringing the lawsuit. . . . There being no property subject to the demands of the claimants, the main purpose of the interpleader action cannot be brought about.

Furthermore, the Bank's assertion that the distributions are merely "interim in nature" is based upon a fiction unsupported by the law of Arkansas and Mississippi.

The Bank itself asserted that:

> . . . the Arkansas and Mississippi decisions as to how [the federal estate] taxes shall be paid necessarily prevent the Bank from requiring anyone to pay them. (Brief of Plaintiff/Appellee, First Tennessee Bank, in 6th Circuit Court of Appeals, p. 14.)

The Bank has admitted that the Arkansas and Mississippi decisions prevent the Bank from requiring either the Arkansas or Mississippi beneficiaries to pay the taxes, yet it attempts to base interpleader jurisdiction on the theory that under the laws of Arkansas and Mississippi the Bank may still attempt to require the Arkansas or Mississippi beneficiaries to pay the taxes.

The Court of Appeals agreed with the District Court's finding of fact that the assets of the estate which were in the hands of the Bank have been completely depleted:

> Conflicting rulings . . . by the courts of Arkansas and Mississippi have resulted in the executor's being required to pay a portion of the federal estate tax applicable to the Mississippi real estate from its own funds rather than from the decedent's estate. (App. A 3)

Neither the District Court nor the Court of Appeals found that there was any stake in the hands of the Plaintiff Bank.

The testimony of the Bank's estate administration manager, Mr. Blumenthal, admitted that there are no claims being asserted against the Bank by either the Mississippi or the Arkansas beneficiaries. (App. B 70, 72)

This is simply an action by the Bank to recover money from the defendants. It is not in the nature of interpleader and none of the jurisdictional requirements of the interpleader statute are present.

CONCLUSION

Petitioners urge the Court to issue a writ of certiorari to review and reverse the judgment of the Court of Appeals. This action is not in the nature of interpleader and the statutory requirements of interpleader cannot be met, nor can its purposes be furthered by the District Court's assumption of jurisdiction.

Respectfully submitted,

EDWARD P. CONNELL
JACK F. DUNBAR
HOLCOMB, DUNBAR, CONNELL,
MERKEL, TOLLISON & KHAYAT
A Professional Association
Post Office Box 368
Clarksdale, Mississippi 38614
(601) 627-2241

Counsel for Petitioners
Dorothy Hope Sullivan
David Sullivan and
Warren Sullivan